Supreme Court, U.S.
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No. 94-1537

In the Supreme Court of the United States

OCTOBER TERM, 1994

JANE M. RICHARDS, F.K.A.
JANE M. MORGAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 26 U.S.C. 6512(b)(3)(B) bars a taxpayer from obtaining a refund of an overpayment of income taxes in a Tax Court case (i) when she failed to file a return for more than two years after the return was due and (ii) then filed her return only after the Commissioner issued the notice of deficiency that led to the Tax Court litigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 37 F.3d 587. The opinion of the Tax Court (Pet. App. 13a-18a) is reported at 65 T.C.M. (CCH) 2137.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1994. The petition for rehearing with suggestion for rehearing en banc was denied on December 15, 1994 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on March 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable provisions of Sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512, are set forth at Pet. 2-5.

STATEMENT

1. Although federal income taxes were withheld from petitioner's wages during 1987, she failed to file an income tax return for that year when it was due, on April 15, 1988. More than two years later, on October 22, 1990, in the absence of any return from petitioner, the Commissioner of Internal Revenue mailed petitioner a notice of a deficiency of $15,507 in her income taxes for 1987. Three months later, on January 23, 1991, petitioner filed a joint income tax return for 1987 with her husband. That untimely return asserted a $15,289 overpayment of their joint income tax liability for 1987 (Pet. App. 2a).

2. a. On the same day that petitioner filed her belated return, she sought a redetermination in the Tax Court of the deficiency asserted by the Commissioner in her 1987 income taxes. Petitioner thereafter amended her Tax Court pleadings to request a determination that she had overpaid her 1987 taxes by $15,289. Upon review of the information contained in petitioner's untimely return of January 23, 1991, the Commissioner stipulated in the Tax Court that a deficiency did not exist in petitioner's 1987 taxes. The Commissioner further stipulated that petitioner had, in fact, made an overpayment of $15,289 in the taxes that she owed for that year (Pet. App. 2a).

Following these stipulations, the only issue remaining in the Tax Court was whether petitioner was entitled to a refund of the $15,289 overpayment. The Commissioner contended that a refund of the overpayment was barred by the provisions of Sections 6511 and 6512 of the

Internal Revenue Code, 26 U.S.C. 6511, 6512 (Pet. App. 13a).

b. The Tax Court agreed with the Commissioner that Sections 6511 and 6512 bar any recovery upon petitioner's refund claim (Pet. App. 13a-18a). The court noted that Section 6512(b)(3)(B) limits the amount of any overpayment that may be refunded in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (Pet. App. 16a, quoting 26 U.S.C. 6512(b)(3)(B)). As the court explained, Section 6512(b)(3)(B) "tests the applicable limitations period of [S]ection 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed" (Pet. App. 17a). Because, as of the date the notice of deficiency was mailed, petitioner had not filed a return for her 1987 taxes, the amount of the overpayment of tax that was refundable to her was the amount of tax she had paid within the two-year period immediately preceding the date that the notice of deficiency was mailed (*ibid.*, citing 26 U.S.C. 6511(b)(2)(A) and (B)). Since petitioner had not paid any of the taxes involved in this case during the two-year period preceding the notice of deficiency, the court concluded that Section 6512(b)(3)(B) bars any refund of petitioner's overpayment (Pet. App. 18a).

3. Noting that several other circuits have upheld the Tax Court's analysis of these statutory provisions,[1] the court of appeals affirmed (Pet. App. 1a-10a). The court

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[1] See, *e.g.*, *Davison* v. *Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (Table) (unpub.), aff'g 64 T.C.M. (CCH) 1517 (1992); *Allen* v. *Commissioner*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.), aff'g 99 T.C. 475 (1992); *Galuska* v. *Commissioner*, 5 F.3d 175 (7th Cir. 1993); Pet. App. 6a n.6.

explained that, under Section 6512(b)(3)(B), the notice of deficiency operates as a refund claim for taxpayers who had not previously filed one. Under Section 6511(b)(2)—which is incorporated by reference for this purpose by Section 6512(b)(3)(B)—the amount of any refund is limited by the amount of the disputed taxes that the taxpayer paid either (i) within the two-year period prior to the date of the refund claim (26 U.S.C. 6511(b)(2)(B)) or, (ii) if the refund claim was made "within 3 years from the time the return was filed," within the three-year period prior to the date of the refund claim (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)).

The court concluded (Pet. App. 5a-6a) that, because petitioner did not file her return until *after* the notice of deficiency was issued, the imputed refund claim that arose upon issuance of the notice of deficiency under Section 6512(b)(3)(B) did not occur "within 3 years from the time the return was filed." The court held that, under Section 6512(b)(3)(B), petitioner therefore could recover only the portion of the overpayment of the disputed taxes that she made during the two-year period prior to the refund claim (under Section 6511(b)(2)(B))—rather than the three-year period prior to the refund claim (under Section 6511(b)(2)(A)). Petitioner acknowledged that no portion of the overpayment had been paid within this two-year period. The court therefore held that petitioner was barred by the statute from obtaining a refund of her overpayment (Pet. App. 6a, 10a).

ARGUMENT

The court of appeals correctly held that petitioner was barred from obtaining a refund of her overpayment under Section 6512(b)(3)(B) of the Internal Revenue Code. We agree with petitioner, however, that this case presents a

recurring question of substantial administrative importance on which there is a direct conflict among the courts of appeals. Review by this Court is therefore warranted.

1. When a taxpayer has petitioned the Tax Court for review of a deficiency asserted by the Commissioner, Section 6512(b)(1) of the Internal Revenue Code authorizes the Tax Court not only to review the claimed deficiency but also to determine the amount of any overpayment that the taxpayer may have made. Any overpayment so determined is to be credited or refunded to the taxpayer, subject however to the express limitations of Section 6512(b)(3). See 26 U.S.C. 6512(b)(1). Because the existence of an overpayment was conceded in this case, the amount of the refund to which petitioner is entitled turns solely on the correct application of the refund limitations contained in Section 6512(b)(3).

Section 6512(b)(3)(B) limits the amount of any refund of an overpayment to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).[2] As the Tax Court explained in this case, Section 6512(b)(3)(B) "tests the applicable limitations period of Section 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed" (Pet. App. 17a).[3]

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[2] Paragraph (3) of Section 6512(b) has three subparagraphs. Section 6512(b)(3)(B) is the one applicable to this case: Section 6512(b)(3)(A) does not apply because no payments were made by petitioner after the notice of deficiency was mailed; Section 6512(b)(3)(C) does not apply because no claim for refund was filed by petitioner before the notice of deficiency was mailed. See 26 U.S.C. 6512(b)(3)(A)-(C).

[3] The applicable period involved in this case is that specified in Section 6511(b)(2). Section 6511(c) and (d), which is also in-

As the court of appeals explained (Pet. App. 5a-7a), under Section 6511(b)(2)—which Section 6512(b)(3)(B) incorporates by reference—the amount of any refund is limited by the amount of the disputed taxes that the taxpayer paid either (i) within the two-year period prior to the date of the refund claim (26 U.S.C. 6511(b)(2)(B)) or, (ii) if the refund claim was made "within 3 years from the time the return was filed," within the three-year period prior to the date of the refund claim (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)). As the court noted, since the notice of deficiency, and thus the imputed refund claim of the taxpayer (under Section 6512(b)(3)), occurred *before* petitioner filed her return, her statutorily imputed refund claim was not filed "within 3 years *from the time* the return was filed" (Pet. App. 6a, quoting 26 U.S.C. 6511(a) (emphasis added by court)). Accord, *Galuska* v. *Commissioner*, 5 F.3d 195, 197 (7th Cir. 1993) ("at the time Galuska was deemed to have filed his claim for refund * * * he had not filed his return * * *. Therefore the 2-year period prescribed in Section 6511(a) is applicable."). Since petitioner's return was filed *after* her refund claim, the two-year, rather than the three-year, refund period applies to this case.

The taxes withheld from petitioner's 1987 income are deemed to have been paid on the date that her return for that year was due—on April 15, 1988. See 26 U.S.C.

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corporated by reference in Section 6512(b)(3)(B), is not applicable on the facts of this case: Section 6511(c) applies only when the time for assessing a tax has been extended by agreement; Section 6511(d) applies only to situations involving specific types of claims—such as bad debts, worthless securities, net operating losses, and certain credit carrybacks—that the present case does not involve. See 26 U.S.C. 6511(c) and (d) (1988 & Supp. V 1993).

6513(b)(1). Her imputed refund claim occurred more than two years after that date, on October 22, 1990 (Pet. App. 2a). Because no portion of the overpayment was paid within the two-year period preceding the notice of deficiency, petitioner was not entitled to a refund (*id.* at 6a). In *Galuska* v. *Commissioner*, 5 F.3d at 196, the Seventh Circuit reached the same conclusion on identical facts. See also cases cited note 1, *supra*.

2. Petitioner is correct in noting (Pet. 9) that the Fourth Circuit's recent decision in *Lundy* v. *Internal Revenue Service*, 45 F.3d 856 (1995), directly conflicts with the decision in this case.[4] *Lundy* also conflicts with the Second Circuit's decision in *Davison* v. *Commissioner*, 9 F.3d 1538, the Sixth Circuit's decision in *Allen* v. *Commissioner*, 23 F.3d 406, the Seventh Circuit's decision in *Galuska* v. *Commissioner*, 5 F.3d 975, and the Ninth Circuit's decision in *Rossman* v. *Commissioner*, 46 F.3d 1144 (1995) (Table) (unpub.), aff'g 66 T.C.M. (CCH) 336 (1993).

Prior to the Fourth Circuit's decision in *Lundy*, the courts had unanimously rejected the contention that an untimely return, filed after the notice of deficiency, may permit application of the three year refund period under Section 6512(b)(3)(B). See *Galuska* v. *Commissioner*, 5 F.3d at 196 ("[a]t least twelve other Tax Court decisions are in accord, and we discovered no case that is *contra*"); see also *id.* at 196 n.2; Pet. App. 6a n.6. Expressly rejecting the consistent view of these other courts, however, the Fourth Circuit held in *Lundy* that a taxpayer who filed his tax return for the year in issue after he had been issued a notice of deficiency, and more than two years after he paid the taxes giving rise to the

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[4] We intend to file a petition for a writ of certiorari in *Lundy* on or before May 1, 1995.

overpayment, was not barred by Section 6512(b)(3)(B) from obtaining a refund of his overpayment in Tax Court. 45 F.3d at 861-862. Without squarely confronting the words of the statute, the court in *Lundy* relied on what it perceived to be evidence in "the legislative history of § 6512 [that] indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency." 45 F.3d at 863. Based on this reading of the legislative history, the court in *Lundy* stated (*ibid.*):

> We interpret § 6512(b)(3)(B) to provide for a three-year refund period where the taxpayer files a claim for refund in Tax Court within three years of filing his tax return and to commence the refund period from the date of the mailing of the notice of deficiency.

In reaching that conclusion, the court in *Lundy* also relied on what it perceived to be the potential anomaly that "Lundy would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court." 45 F.3d at 860. The court assumed in making this assertion that a return filed by a taxpayer more than two years after the return is due would permit a *subsequent* refund claim to invoke the three-year refund period of Section 6511(b)(2)(A). That assumed result, of course, has no direct relevance to the proper interpretation of the plain language of Section 6512(b)(3)(B). Moreover, the court's assumption that the same taxpayer would fare differently in a refund suit in the Court of Federal Claims or in federal district court than in the Tax Court has been squarely rejected by the Ninth Circuit in *Miller* v. *United States*, 38 F.3d 473 (1994). In *Miller*,

the court ruled that, when a return is not filed within "two years after the date of payment," the taxpayer's claim—whether brought in the Court of Federal Claims, federal district court *or* in the Tax Court—is barred by Section 6511(a). See 38 F.3d at 476. The court explained in *Miller* that an untimely return filed more than two years after the date of payment "cannot resurrect the three-year period" (*id.* at 475):

> If the clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

See also *Oropallo* v. *United States*, 994 F.2d 25, 30 (1st Cir. 1993) ("We have assumed [for the sake of argument] that a return can be filed at any time after its due date and still be a return for purposes of filing a claim within that three-year period. Under that interpretation, the limitations period in section 6511(a) is totally illusory."), cert. denied, 114 S. Ct. 705 (1994).[5]

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[5] Revenue Ruling 76-511, 1976-2 C.B. 428, assumes that, if (i) a return is filed more than two but less than three years after it is due and (ii) a refund claim is filed contemporaneously or subsequently, "the refund would [be] allowable since the overpayment would have been made within the 3-year period immediately preceding the filing of the claim." *Id.* at 429. That Ruling is inconsistent with the court of appeals' conclusion in *Miller*. See 38 F.3d at 475. In light of the reasoning set forth in *Miller* and in *Oropallo*, however, the Service advises us that the Commissioner is reconsidering her position under Ruling 76-511.

The decision in *Lundy* directly conflicts with the decisions of five other circuits. Moreover, as the courts explained in this case and in *Galuska*, the decision in *Lundy* cannot be reconciled with the plain language of Section 6512(b)(3)(B). Finally, the reasoning of the court in *Lundy* is based upon an asserted inconsistency in the treatment of refund claims brought in the Tax Court—as contrasted with refund suits in other courts—that the court in *Miller* concluded does not exist.

3. The conflict that exists among the courts of appeals on the question presented in this case is a recurring one of substantial administrative importance. As the court noted in *Lundy*, in expressly disagreeing with the decisions of other circuits, this issue arises with substantial frequency and has been the subject of repetitive litigation. See 45 F.3d at 864-868. The frequency of such litigation will, of course, be augmented even further by the direct conflict that now exists on this issue.

Because of the conflict among the circuits, taxpayers who reside in the Fourth Circuit will obtain refunds of overpayments that similarly-situated taxpayers who reside in the Second, Sixth, Seventh, Ninth and Tenth Circuits will be denied. Review by this Court of the decision in this case is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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